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No. 86-314

In The
Supreme Court of the United States
October Term, 1986

BARBARA ANN ALLEY and W. H. ALLEY,
Petitioners,

v.

GUBSER DEVELOPMENT COMPANY, NATIONAL GYPSUM COMPANY, and WEYERHAEUSER COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Tenth Circuit Court of Appeals correctly hold that the petitioners were precluded from appealing the district court's judgment because of their acceptance of a remittitur in order to avoid a new trial?

LIST OF PARTIES

All parties to the proceeding in the United States Court of Appeals for the Tenth Circuit are identified in the caption. Gubser Development Company has no parent, subsidiary, or affiliate companies. Aancor Holdings, Inc., a Delaware corporation, is the parent company of National Gypsum Company. National Gypsum Company has no subsidiaries other than wholly owned subsidiaries. The affiliates of National Gypsum Company are: Yeso Santa Rosalia, S.A. de C.V.; Lafarge Coppee, S.A.; CJC Group; Goldman Sachs & Co.; and Joseph A. Hardy, Sr.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Gubser Development Company and National Gypsum Company respectfully request this Court to deny the petition for writ of certiorari of Barbara Ann Alley and W. H. Alley seeking review of the decision of the Tenth Circuit Court of Appeals that the petitioners' acceptance of the remittitur ordered by the district court precluded any appeal by the petitioners. That opinion is reported at 785 F.2d 849 (10th Cir. 1986).

STATEMENT OF THE CASE

Respondents disagree with petitioners' Statement of the Case in several respects and adopt instead the Tenth Circuit's discussion of Facts, Trial, Motions For Directed Verdict, and Post-Trial Motions in the opinion below which is included in Appendix B filed by the petitioners. There are, in addition, certain inaccuracies and omissions in petitioners' Statement of the Case which are particularly relevant to the determination of whether the petition for writ of certiorari should be granted.

Petitioners, who were the plaintiffs in the trial court, assert that the district court dismissed their claim for attorneys' fees under the Magnuson-Moss Warranty Act prior to trial. Pet. 8. On the contrary, a verdict was directed against the plaintiffs on this claim after the close of their case, based on the district court's finding that no evidence of property damage or direct damage had been presented. App. B at 14; R. Vol. XXII at 1450.

Furthermore, the plaintiffs have neglected to mention that the remittitur of punitive damages ordered by the district court was an alternative offered as a means for the plaintiffs to avoid the new trial which otherwise would have been ordered. The district court made clear in its order that should the plaintiffs choose to reject the remittitur of punitive damages, "a new trial will be ordered *on all issues*, because a trial on the issue of punitive damages alone would create undue confusion." App. A at 17-18 (emphasis added). The plaintiffs chose to accept the remittitur and obtain the benefits of the remitted judgment rather than relitigating in a new trial issues which they felt had been incorrectly decided by the district court. App. B at 21, 33. The Tenth Circuit explained

that because the district court's remittitur order "embraced all issues considered in the case," the plaintiffs' acceptance of the remitted judgment waived their right to appeal any of those issues, including the remittitur itself, the Magnuson-Moss Warranty Act claim, and the denial of prejudgment interest. App. B at 30-33.

ARGUMENT:

REASONS FOR DENYING THE WRIT

The Tenth Circuit Court of Appeals held that the plaintiffs could not appeal various rulings made by the district court because they had accepted the district court's remittitur order. The decision was based on the particular facts involved and on binding precedent from this Court. Far from presenting a case which necessitates an exercise of this Court's power of supervision over courts of appeals, the Tenth Circuit's decision was required by this Court's holding in *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977). Moreover, claimed conflicts among the various courts of appeals which have addressed this question arise entirely from the differing types of fact situations which their opinions have considered. The decision below simply does not present important legal principles which warrant the exercise of this Court's jurisdiction on writ of certiorari.

I. The Issue Raised Is Squarely Governed By This Court's Decision In Donovan v. Penn Shipping Co. Which Was Correctly Applied By The Tenth Circuit.

It is an established precept of federal procedural law that "a plaintiff in federal court . . . may not appeal from a remittitur order he has accepted." *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 650 (1977). This unequivocal authority was recognized by the Tenth Circuit and correctly applied in its decision in this case. App. B at 31-33. Although the plaintiffs are attempting to carve out exceptions to this procedural rule, the *Donovan* decision admits no such tinkering. The preclusion of appeals by plaintiffs who have accepted a remittitur applies without distinction to all issues encompassed by the remittitur order.

It is clear beyond cavil that the plaintiffs' acceptance "under protest" of the remittitur of punitive damages has no legal significance and did not reserve their right to appeal. *Donovan*, 429 U.S. at 649. Moreover, the prohibition against appeals by a plaintiff after acceptance of a remittitur is equally applicable to attempted cross appeals as direct appeals. Although the *Donovan* opinion addressed an attempted direct appeal by a plaintiff, the decision expressly reaffirms previous Supreme Court authority on remittitur practice including at least one case in which a cross appeal was barred. *Donovan*, 429 U.S. at 649-50.

For example, in *Woodworth v. Chesbrough*, 244 U.S. 79 (1917), a plaintiff who had accepted a remittitur in the lower court attempted to prosecute a "cross writ of error" after the defendant appealed. This Court, reason-

ing that the plaintiff should not be permitted to retract his consent to the remittitur and yet appeal the judgment which was entered only because of that consent, held that the cross writ must be dismissed. 244 U.S. at 82. The *Donovan* reaffirmation of *Woodworth v. Chesbrough* makes it crystal clear that the general procedural rule applies to cross appeals by accepting plaintiffs as well as direct appeals. *Donovan*, 429 U.S. at 649-50. Additionally, the circuit courts of appeals which have considered this question subsequent to the *Donovan* decision have uniformly agreed that no cross appeals can be permitted. *See Fiacco v. City of Rensselaer, New York*, 783 F.2d 319, 333 (2d Cir. 1986); *Consumers Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093, 1099-1100 (3d Cir. 1986); *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1145 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1489 (1986); *999 v. C.I.T. Corp.*, 776 F.2d 866, 873 (9th Cir. 1985); *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1541 (11th Cir. 1985); *Richards v. Allstate Insurance Co.*, 693 F.2d 502, 506 (5th Cir. 1982). Thus, the plaintiffs' argument that the prohibition against direct appeals does not extend to cross appeals simply does not hold water.[1]

Similarly, the plaintiffs' futile attack on the general practice of remittitur comes over one hundred and sixty years too late. The propriety of remittitur was officially recognized by Justice Story in *Blunt v. Little*, 3 Mason,

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[1] Respondents note that plaintiffs have based their argument on the erroneous assertion that at one time neither plaintiffs nor defendants could appeal after a remittitur had been accepted. Previous decisions of this court indicate that defendants' appeals have always been heard. *Chesbrough v. Woodworth*, 244 U.S. 72 (1917); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41 (1895).

102, 107 (1822) and the use of this device to remedy grossly excessive damages awards has been reaffirmed in decision after decision, culminating with the *Donovan* opinion in 1977. *See Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977) and cases cited therein; *Northern Pacific Railroad Co. v. Herbert*, 116 U.S. 642, 647 (1886); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 73 (1889). *See also Dimick v. Schiedt*, 293 U.S. 474, 482-85 (1935). Given this solid history, the plaintiffs' assertion that remittitur practice is based on "shaky precedents," Pet. 19, is utterly mystifying.

Accordingly, the decision of the court below that the plaintiffs' attempted appeals would not be heard was mandated by the unwavering decisions on the issue from this Court. The granting of the petition for writ of certiorari would not enlarge the body of legal knowledge as the issue raised has previously been decided.

II. There Is No Conflict Among The Circuit Courts Regarding The Effect Of Acceptance Of A Remittitur Order.

Plaintiffs contend that this Court should grant the petition for writ of certiorari because of the existence of a conflict among the circuit courts regarding appeals from accepted remittitur orders. Essentially, plaintiffs point to *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977), and argue that this and other circuit court decisions have permitted an appeal by a plaintiff who has accepted a remittitur. However, *Call Carl* and the other decisions cited by plaintiffs are clearly distinguishable from the instant case and do not establish a conflict among the circuits.

Each of the circuit court decisions cited by the plaintiffs involves a factual situation in which the district court ordered a new trial *solely on the issue of damages* unless the plaintiffs consented to a remittitur of the jury verdict. *See Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623, 625 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Baltezore v. Concordia Parish Sheriff's Dept.*, 767 F.2d 202, 208 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 817 (1986); *Aaro v. Daewoo International (America) Corp.*, 755 F.2d 1398, 1400 (11th Cir. 1985); *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1541 (11th Cir. 1985). *See also Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (Plaintiff allowed to appeal ruling on equitable relief entered after a remitted jury verdict on damages had been accepted in order to avoid a new trial solely on the damages claim). In these cases, if the plaintiffs had rejected the remittitur and forced a new trial, they still would not have had the opportunity to relitigate the other issues they were appealing because the scope of the new trial would have been strictly limited to the amount of damages available on the claims on which the previous jury had decided in their favor. Claims which had been dismissed by the district court or on which directed verdicts had been entered could not be addressed in the second trial. Thus, the plaintiffs' acceptance of the remittitur was understandably not construed as their consent to the previous resolutions of separate issues and a waiver of their right to appeal those issues. *Aaro, Inc. v. Daewoo International (America) Corp.*, 755 F.2d at 1401.

The facts presented in the instant case differ on this crucial point from the cases relied upon by the plaintiffs.

Here, the district court's remittitur order specifically required a new trial on all issues considered in the case because a new trial on punitive damages only would have been too confusing. App. A at 17-18. If the plaintiffs had chosen to reject the remittitur, both the Magnuson-Moss Warranty Act claim and the issue of prejudgment interest would have been presented again to the district court for decision. New evidence on each of these issues could have been offered and additional arguments made to the court.[2] In choosing the remittitur to avoid a new trial which would have included these issues, the plaintiffs took the benefit of the remitted judgment and gave up their right to appeal.

This distinction among the various circuit court decisions is clearly supported by the rationale of *Donovan* and other Supreme Court decisions. This rationale was first discussed in *Woodworth v. Chesbrough*, 244 U.S. 79 (1917), one of the cases reaffirmed in the *Donovan* opinion. In that case, this Court characterized the acceptance of a remittitur as the condition through which the district court's final judgment was obtained. 244 U.S. at 82. A rejection of the remittitur by the plaintiff on the other hand would necessarily have forced a new trial and it is well established that "[a]n order granting a new trial is interlocutory in nature and therefore not immediately appealable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Only the plaintiff's accept-

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[2] As noted in Respondents' Statement of the Case, it was the district court's finding that no evidence of property or direct damage had been presented which led to the directed verdict against the plaintiffs on their Magnuson-Moss Warranty Act claim.

ance of the remittitur creates a judgment and an appealable order. *Woodworth v. Chesbrough*, 244 U.S. at 82. A plaintiff's attempt to contest the remittitur order on appeal after acceptance is seen as a withdrawal of consent to the remittitur, thus vitiating the judgment itself and returning the proceedings in the lower court to an unappealable status. *Id. See also* Note, *Appealability of Judgments Entered Pursuant to Remittiturs in Federal Courts*, 1975 Duke L.J. 1150, 1155-57; *Kennon v. Gilmer*, 131 U.S. 22, 29-30 (1889); *Lewis v. Wilson*, 151 U.S. 551, 554-55 (1894); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 52 (1895).

The district court's remittitur order in this case required a new trial on all issues. The plaintiffs' acceptance of the remittitur, therefore, must be viewed as their consent to the judgment as entered on all issues.[3] These issues include the district court's directed verdict against the plaintiffs on their Magnuson-Moss Warranty Act claim because of the lack of evidence of property or direct damage, as well as the court's ruling that prejudgment interest would not be added to the judgment because of the plaintiffs' previous failure to request it as required by Colorado law. An attempt to appeal the district court's decision on any of those issues is, therefore, a withdrawal of consent to the remittitur which invalidates the judgment itself and precludes any appeal. The Tenth Circuit decision correctly recognized that the rationale of *Dono-*

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[3] Contrary to plaintiffs' assertions, a new trial does not necessarily include relitigation of all issues. *See* Pet. 15. Rule 59 of the Federal Rules of Civil Procedure expressly permits a federal district judge to grant a new trial on all or any part of the issues previously considered.

van and its predecessors prohibited the plaintiffs' appeals because of the all-inclusive scope of the remittitur order.

The theory espoused by the plaintiffs, that separate and distinct controversies can be appealed after acceptance of a remittitur, is addressed only in *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977). But, as explained above, that decision considered a case in which a new trial had been ordered on damages only unless the plaintiff accepted a remittitur.

Moreover, recent case law from the Fourth Circuit has apparently invalidated the decision in *Call Carl*. In *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 205 (4th Cir. 1982), *cert. denied*, 460 U.S. 1102 (1983), the court of appeals held that a plaintiff who had accepted a remittitur could not challenge the district court's decisions or rulings which had preceded the jury verdict. The *Arnold* court reasoned that allowing such a cross appeal of an earlier ruling, such as a ruling on a motion for directed verdict, would permit direct circumvention "of the *Donovan* prohibition against remitting-plaintiff appellate challenges." 681 F.2d at 205 n.19. The court held that, in such a situation, the remitting plaintiff "is limited as appellee to defending . . . the judgment as entered and may not seek to enlarge her rights under it." *Id.* at 205. A contrary result would permit plaintiffs to attempt to enlarge their rights under the remitted judgment in spite of the long-standing prohibition against such a practice. *See United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924). Thus, the continuing viaibity of *Call Carl* even within the Fourth Circuit is subject to considerable doubt. A grant of certiorari to

review an alleged conflict based on mere factual distinctions and in which the petitioners' leading case has been effectively overruled would be an exercise in futility.

CONCLUSION

The previous Supreme Court authority on the question raised by the plaintiffs has provided adequate guidance to the courts of appeals in determining the correct result in the individual cases which have been presented to them. The differences in the circuit court decisions stem from the different types of factual situations involved. Properly rejected by the court of appeals in this case, the plaintiffs' theory does not merit this Court's consideration.

Respectfully submitted,

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